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Paper No. 7

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APR 07 2004

In re Application of
Glover
Application No. 10/027,819
Filed: December 21, 2001
Attorney Docket No. G-165
For: DOOR HINGE

OFFICE OF PETITIONS

ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), and in the alternative, under 37 CFR 1.137(b), to revive the above-identified application. Both petitions were filed in the same paper on March 25, 2004.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **DISMISSED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

This application was filed on December 21, 2001. On February 1, 2002, the Office mailed a Notice to File Missing Parts of Nonprovisional Application (Notice), setting forth a 2 month extendable period to submit the basic filing fee, an executed oath/declaration, and a surcharge for their late filing. The Office did not receive a timely reply. Thus, this application became technically abandoned on April 2, 2002. A Notice of Abandonment was mailed on December 2, 2003.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition lacks item (3).

Regarding (3), petitioner has not shown to the satisfaction of the Commissioner that the entire delay from the due date of the reply to the filing of a grantable petition was unavoidable.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

Petitioner alleges that the delay in responding to the February 1, 2002 Notice was unavoidable because the inventor was beset with a number of health problems that had started by the time the February 1, 2002 Notice was mailed, continued until some point in 2002, and then resumed again in mid 2003.

Thus, petitioner asserts incapacitation as a cause of the delay. A showing of "unavoidable" delay based upon incapacitation must establish that the incapacitation was of such a nature and degree as to render the incapacitated person unable to conduct business (e.g., correspond with the Office) during the period between April 1, 2002 (the due date for responding to the February 1, 2002 Notice) to the present. Such a showing must be supported by a statement from the incapacitated person's treating physician, and such statement must provide the nature and degree of incapacitation during the above-mentioned period.

Petitioner has not provided independent supporting evidence of the debilitating nature of his health problems. Moreover, petitioner has stated that in 2003 he began working again. If petitioner could work at that point, petitioner was not completely incapacitated. Petitioner could have attended to his outstanding patent business. Petitioner's preoccupation with other matters which took precedence over the above-identified application does not constitute unavoidable delay. See Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

The petition under 37 CFR 1.137(a) is dismissed.

In the alternative, petitioners request consideration under 37 CFR 1.137(b).

Petitioner has submitted \$665.00 in petition fees. The petition fee for the petition under 37 CFR 1.137(a) is \$55.00. This leaves only \$610.00 to apply towards the fee owed for the petition under 37 CFR 1.137(b).

Any petition under this section must be accompanied by the petition fee. The payment of a petition fee to obtain the revival of an abandoned application is a statutory prerequisite to revival of the abandoned application, and cannot be waived.

The phrase "[o]n filing" in 35 U.S.C. 41(a)(7) means that the petition fee is required for the filing (and not merely the grant) of a petition under 37 CFR 1.137. See H.R. Rep. No. 542, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 770 ("[the fees set forth in this section are due on filing the petition"). Accordingly, the Commissioner is statutorily precluded from further review of the petition until the petition fee is paid in full.

The petition under 37 CFR 1.137(b) is dismissed. Petitioner is strongly encouraged to submit **\$55.00**, which, taken with the \$610.00 balance, will make the \$665.00 petition fee.

Further correspondence with respect to this matter should be addressed as follows:

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Post Office Box 1450
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By hand: Crystal Plaza 1 Lobby
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Telephone inquiries pertaining to this matter may be directed to the undersigned at (703) 308-6712.


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